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Supreme Court of the United States.

Brief for Amicus Curiae National African American Gun Association, Inc. in Support of Respondent

2023 WL 6622879 | UNITED STATES OF AMERICA, Petitioner, v. Zackey RAHIMI, Respondent. | Supreme Court of the United States. *(Approx. 23 pages)*

v.

Zackey RAHIMI, Respondent.

No. 22-915.
October 4, 2023.

On Writ of Certiorari to the United States Court of Appeals for the Fifth circuit

Brief for Amicus Curiae National African American Gun Association, Inc. in Support of Respondent

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*i QUESTION PRESENTED

Whether 18 U.S.C. 922(g)(8), which prohibits the possession of firearms by persons subject to domestic violence protective orders, violates the Second Amendment on its face.

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*1 STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae National African American Gun Association, Inc. (NAAGA) is a nonprofit association headquartered in Griffin, Georgia, with tax exempt status under Internal Revenue Code § 501(c)(4). [1] NAAGA was founded on February 28, 2015, to defend the Second Amendment rights of members of the African-American community. NAAGA has over 130 chapters in 38 states, and over 47,000 members living in every state of the United States and the District of Columbia.

NAAGA's mission is to establish a fellowship by educating on the rich legacy of gun ownership by African Americans, offering training that supports safe gun use for self defense and sportsmanship, and advocating for the inalienable right to self defense for African Americans. Its goal is to have every African American introduced to firearm use for home protection, competitive shooting, and outdoor recreational activities. NAAGA welcomes people of all religious, social, and racial perspectives, including African-American members of law enforcement and active/retired military.

NAAGA's interest in this case stems in part from the fact that the Second Amendment right to bear arms was denied to African Americans under the *2 antebellum Slave Codes, the post-Civil War Black Codes, and the Jim Crow laws that persisted into the twentieth century. Such laws often included arbitrary prohibitions on the possession of firearms. Such laws invariably discriminate against the poor and minorities. NAAGA will bring before the Court matter not brought to its attention by the parties.

SUMMARY OF ARGUMENT

Every American is among "the people" with a presumptive right to possess arms, and the United States has not demonstrated that 18 U.S.C. § 922(g)(8) "is consistent with the Nation's historical tradition of firearm regulation." See *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2129-30 (2022). None of the laws it proffers as historical analogues are "relevantly similar" to Founding-era historical precedents. *Id.* at 2132.

In the court below, the United States cited the slave codes as a historical analogue. It has dropped that argument before this Court, but its amici have not. The slave codes provide no support for the ban at issue because African Americans were not considered as among "the people" to whom the Bill of Rights applied.

The United States relies on laws disarming "Greasers," "tramps," and "vagrants" to show that dangerous classes of people could be disarmed. But like the slave codes, these laws relied on unwarranted classifications based on race and class. Under these laws, a person living in poverty could be disarmed, jailed, and forced into servitude.

*3 The United States appeals to laws and practices related to political repression, riot, war, and insurrection. But the disarming of political opponents by British monarchs based on religion, of loyalists by the American patriots who were fighting for their lives during the Revolution, and by a state following an insurrection provide no support here.

Founding-era laws made it an offense for a person to threaten others with violence, to go armed in a manner to terrorize others, and otherwise to threaten the peace. While the arms that were used in these offenses were subject to forfeiture, none of these laws prohibited the perpetrators from possession or acquisition of other arms.

The United States string cites late 19th century laws restricting sales of arms to minors without referring to the actual contents of these laws. These laws are too late to be relevant to the understanding of the Second Amendment in 1791. They are also so dissimilar that they hardly have a common thread. The handful of cited laws that regulated where or how certain minors could carry certain arms prove nothing relevant here.

Laws are cited that prohibited sale of arms to persons of unsound mind and to persons who are intoxicated. While those laws appear to be consistent with the Second Amendment, they are not appropriate historical analogues to § 922(g)(8).

Finally, the United States argues that § 922(g)(8) is warranted by "novel modern conditions." First, it claims that historical laws did not target domestic abusers. To the contrary, English law provided that "a wife may now have security of the ***4** peace against her husband ..." 1 Blackstone, *Commentaries*, *433 (1765). Abusers have always been subject to surety laws and criminal laws.

The United States argues, secondly, that technological improvements in firearms has led to their increased use in homicides. But knives, blunt objects, and other substitute weapons were used at similar rates. At the Founding, assault and murder had the same definitions regardless of the instrument used. The criminal misuse of firearms has not created "novel modern conditions," *Bruen*, 142 S. Ct. at 2134.

In sum, § 922(g)(8) is not "consistent with the Nation's historical tradition of firearm regulation" and facially violates the Second Amendment.

ARGUMENT

Preliminary Statement

This case is about whether the prohibition on mere possession of a firearm by a person subject to a restraining order under 18 U.S.C. § 922(g)(8) facially violates the Second Amendment. It is not about the far broader issue of how a victim may best protect herself from threats by an intimate partner, such as by a state-issued restraining order or by arming herself.

"[A]n abusive boyfriend put [Jaime Caetano] in the hospital" and she was "in fear for [her] life." *Caetano v. Massachusetts*, 577 U.S. 411, 412-13 (2016) (Alito, J., concurring). "She obtained *multiple restraining orders* against her abuser, but they *proved futile.*" *Id.* at 413 (emphasis added). She then obtained a stun gun for self-defense. *Id.*

***5** Whatever their effectiveness, the issue of whether state laws providing for restraining orders are consistent with the rights to bear arms and to due process is not before this Court. According to the United States, "at least 48 States and territories have adopted laws that disarm, or authorize courts to disarm, individuals who are subject to domestic-violence protective orders." Brief for the United States (hereafter "Br.") at 8, 34-35.

In Texas "it is unlawful for any person .... who is subject to a protective order to possess a firearm or ammunition." Tex. Family Code § 85.026. Rahimi allegedly violated not only that provision, but is charged with a number of felonies under Texas law. Br. 2-3.

Prosecutions under § 922(g)(8) are relatively few[2] and the statute itself is redundant with the state laws on restraining orders. Contrary to the United States, the Fifth Circuit did *not* hold that the Second Amendment bars the States from enacting laws "to keep firearms out of the hands of individuals who endanger their intimate partners." Br. 2. See *United States v. Rahimi*, 61 F.4th 443, 448 (5th Cir. 2023) (limiting holding to § 922(g)(8)).

"When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government ***6** must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2129-30 (2022). "[D]etermining whether a historical regulation is a proper analogue for a distinctly modern

firearm regulation requires a determination of whether the two regulations are 'relevantly similar.'" *Id.* at 2132.

This brief addresses why the historical restrictions that have been cited by the United States and its amici are not appropriate historical analogues under this Court's *Bruen* decision. These restrictions include the slave codes; laws disarming "Greasers," "tramps," and "vagabonds"; laws and practices during times of political repression, riot, war, and insurrection; laws providing for forfeiture of arms used in offenses; laws on the sale of arms to, and the carrying of arms by, minors; and laws on sales to persons of unsound mind and to intoxicated persons. It also demonstrates that § 922(g)(8) is not warranted by "novel modern conditions."

I. The Slave Codes Were Premised on the Denial that Blacks Were Among "The People"

Under the heading "Section 922(g)(8) is analogous to historical laws that disarmed dangerous people," the United States wrote in the court below: "Several colonies (or states) also passed statutes disarming classes of people deemed to be threats, including ... slaves ..." Supplemental Brief for Appellee the United States, *United States v. Rahimi*, No. 21-11001, at 22-23 (5th Cir. Aug. 9, 2022).

***7** The court below responded to this argument: "Laws that disarmed slaves ... may well have been targeted at groups excluded from the political community-i.e., written out of 'the people' altogether-as much as they were about curtailing violence or ensuring the security of the state." *Rahimi*, 61 F.4th at 456. Such laws are not "relevantly similar" to § 922(g)(8) as historical analogues because *"why* they disarmed people was different," i.e., "the preservation of political and social order, not the protection of an identified person from the threat of 'domestic gun abuse,'... posed by another individual." *Id.* at 457.

In this Court, the United States has dropped its reference to the slave codes as a historical analogue. But its amici hold on to the argument. Under the topic "Founding Era Disarmament Of Dangerous Individuals," one brief refers to laws that "targeted slaves and freed black people." Brief for Amici Curiae Professors of History and Law at 6, 10.[3] A scholar's article endorsed in the Brief of Second Amendment Law Scholars at 15 n.4, and on whose behalf the brief was filed, advocates such reliance, as "it would be especially incongruous to use the racist history of gun regulations to pretermit legislation today." "Federal Weapons Prosecutions Rise for Third Consecutive Year," *Trac Reports*, Nov. 29, 2017. ***8** https://trac.syr.edu/tracreports/crim/492/.[4]

The slave codes are in no way relevant analogues to the ban here because African Americans were not considered among "the people" protected by the Second Amendment. In the colonial, founding, and early republic periods, citizens were recognized as having the right to keep and bear arms. The only exception was the slave codes that prohibited slaves and free blacks from bearing arms. See Stephen P. Halbrook, *The Right to Bear Arms: A Constitutional Right of the People or a Privilege of the Ruling Class?* 226-32 (2021).

Slaves were deprived of all of the rights that would be set forth in the Bill of Rights. St. George Tucker summarized their plight thus:

> To go abroad without a written permission; to keep or carry a gun, or other weapon; to utter any seditious speech; to be present at any unlawful assembly of slaves; to lift the hand in opposition to a white person, unless wantonly assaulted, are all offences punishable by whipping.

St. George Tucker, *A Dissertation on Slavery: With a Proposal for the Gradual Abolition of It, in the State of Virginia* 65 (1796).

The following sets forth a sampling of slave code provisions and judicial decisions that justified them on the basis that African Americans were not considered citizens.

***9** A Virginia law provided that "no negro or mulatto shall keep or carry any gun," except that a free negro or mulatto housekeeper may "keep one gun," and a bond or free negro may "keep and use" a gun by license at frontier plantations. Acts of 1748 (6 Hening, Statutes at Large 109-10) and 1792 (12 Hening, Statutes at Large 123).

As a Virginia court held, among the "numerous restrictions imposed on this class of people [free blacks] in our Statute Book, many of which are inconsistent with the letter and spirit of the Constitution, both of this State and of the United States," was the restriction "upon their right to bear arms." *Aldridge v. Commonwealth*, 2 Va. 447, 449 (Gen. Ct. 1824).

Maryland made it unlawful "for any negro or mulatto ... to keep any ... gun, except he be a free negro or mulatto ...." Ch. 86, § I (1806), in 3 Laws of Md. 297 (1811). It was unlawful "for any free negro or mulatto to go at large with any gun, or other offensive weapon ...." *Id.* § II. This did not "prevent any free negro or mulatto from carrying a gun" if he had "a certificate from a justice of the peace, that he is an orderly and peaceable person ...." *Id.*

The Court of Appeals of Maryland described "free negroes" as "a vicious or dangerous population," as exemplified by laws "to prevent their migration to this State; to make it unlawful for them to bear arms; to guard even their religious assemblages with peculiar watchfulness." *Waters v. State*, 1 Gill 302, 309 (Md. 1843).

In Georgia, it was unlawful "for any slave, unless in the presence of some white person, to carry and make use of fire arms," unless the slave had a ***10** license from his master to hunt. Digest of the Laws of the State of Ga. 424 (1802). It was unlawful "for any free person of colour in this state, to own, use, or carry fire arms ...." § 7, 1833 Ga. Laws 226, 228. Georgia's Supreme Court held: "Free persons of color have never been recognized here as citizens; they are not entitled to bear arms, vote for members of the legislature, or to hold any civil office." *Cooper v. Savannah*, 4 Ga. 72 (1848).

By contrast, the Georgia court held that the right to bear arms expressed in the Second Amendment is an inalienable right that applies to the states. *Nunn v. State*, 1 Ga. 243, 250 (1846). It protected "[t]he right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description ...." *Id.* at 251.

Delaware forbade "free negroes and free mulattoes to have, own, keep, or possess any gun [or] pistol" without a permit, which could be granted with a finding "that the circumstances of his case justify his keeping and using a gun ...." Ch. 176, § 1, 8 Laws of the State of Del. 208 (1841). The police power was said to justify restrictions such as "the prohibition of free negroes to own or have in possession fire arms ...." *State v. Allmond*, 7 Del. 612, 641 (1856).

North Carolina declared: "That the people have a right to bear arms for the defense of the state ..." N.C. Dec. of Rights, Art. XVII (1776). "For any lawful purpose - either of business or amusement - the citizen is at perfect liberty to carry his gun." *State v. Huntley*, 25 N.C. (3 Ired.) 418, 422-23 (1843).

***11** North Carolina provided that "no slave shall go armed with Gun," unless he had a certificate to carry a gun to hunt, issued with the owner's permission. Statutes of the State of N.C. 93 (1791). It was unlawful "if any free negro, mulatto, or free person of color, shall wear or carry about his or her person, or keep in his or her house, any shot gun, musket, rifle, pistol, sword, dagger or bowie-knife, unless he or she shall have obtained a licence therefor ..." *State v. Newsom*, 27 N.C. 250, 207 (1844) (Act of 1840, ch. 30). The provision was upheld partly on the ground that "the free people of color cannot be considered as citizens ..." *Id.* at 254.

Explicitly reading African Americans out of the term "the people," three state constitutions provided: "That the free white men of this State shall have a right to keep and to bear arms for their common defence." Tenn. Const., Art. I, § 26 (1834); Ark. Const., Art. II, § 21 (1836); Fla. Const., Art. I, § 21(1838).

Scott v. Sanford, 60 U.S. (19 How.) 393, 417 (1857), argued against recognition of the citizenship of African Americans because it "would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased ...; and it would give them the full liberty of speech ..., and to keep and carry arms wherever they went."

As Frederick Douglass averred, the constitutionality of slavery upheld in *Dred Scott* disregarded "the plain and commonsense reading of the instrument itself; by showing that the Constitution does not mean what it says, and says what it does not mean ...." 2 Frederick Douglass, *Life and Writings* ***12** 420 (1950). The truism that "the people" in the

Second Amendment and other Bill of Rights guarantees really means all of the people would be realized in the Reconstruction Amendments.

In sum, having no arms right was an incident of slavery. Slaves and even free blacks were not considered among "the people" protected by the Second Amendment. A purpose of the slave codes was to prevent African Americans from obtaining arms that could be used to win their freedom. Such laws provide no appropriate historical analogues to justify § 922(g)(8).

II. The Laws Disarming "Greasers," "Tramps," and "Vagrants" Relied on by the United States are Inapposite

The United States relies on racist laws on "Greasers," "tramps," and "vagrants" as historical analogues for § 922(g)(8). Br. 25-26. None of these laws provides support for today's ban.

The United States approvingly cites a California law that "disarmed certain individuals in identified categories if they were 'not known to be peaceable and quiet persons.'" Br. 29 & n.21, citing Act of Apr. 30, 1855, §§ 1-2, in 2 *The General Laws of the State of California, from 1850 to 1864, inclusive* 1076-1077 (Theodore H. Hitchell ed., 1865).

Entitled "An Act to Punish Vagrants," § 1 began: "All persons except Digger Indians,[5] who have no ***13** visible means of support, who in ten days do not seek employment, nor labor when employment is offered to them," along with other listed types, "may be committed to jail and sentenced to hard labor," for ninety days. *Id.*

Section 2, which gave rise to the name "Greaser Act," provided:

> All persons who are commonly known as 'Greasers' or the issue of Spanish and Indian blood, who may come within the provisions of the first section of this Act, and who go armed and are not known to be peaceable and quiet persons, and who give no good account of themselves, may be disarmed by any lawful officer, and punished otherwise as provided in the foregoing section.

Id.

The term "Greaser" was "a commonplace derogatory term for U.S. citizens of Mexican ancestry," and "the true goal of the act was to restrict the movement of Californians of Mexican descent." Kayley Berger, "Surveying the Golden State (1850-2020): Vagrancy, Racial Exclusion, Sit-Lie, & the Right to Exist in Public," 16 *California Legal History* 209, 215 (2021).

The keeper of the jail was required to employ incarcerated persons "at any kind of labor that the Board of Supervisors of the county may direct," ***14** securing them "by ball and chain of sufficient weight and strength to prevent escape." Act, § 4.

The United States also favorably cites, but does not relate the actual contents of, a dozen state laws that "disarmed 'tramps' - that is, vagrants." Br. 25 & n. 19. A "tramp" was typically defined as "Any person without a home in the town or hundred in which he may be found wandering about without employment, and the regular and visible means of living ..." Act of Mar. 27, 1879, ch. 155, § 1, 16 Del. Laws 225 (1879). A tramp who came to town would "be immediately arrested and put to work on the streets or other public works thereof," or hired out "to private persons." *Id.* § 2.

One state punished a tramp with "imprisonment at hard labor" for six months, or for thirty days "in solitary confinement... to be fed on bread and water only ...." Act of Mar. 4, 1879, ch. 188, § 2, 1879 Wis. Sess. Laws 274. A tramp who carried a firearm was punishable by up to two years at hard labor. *Id.* § 4.

A tramp could be imprisoned for six months to two years. Act of Apr. 24, 1880, ch. 257, § 1, 1880 Mass. Acts 232. A tramp would receive additional imprisonment for carrying a firearm.[6]

According to the United States, "State courts upheld such laws on the ground that the disqualified individuals were apt to use arms irresponsibly." Br. 26, citing ***15** *State v.*

Hogan, 63 Ohio St. 202, 58 N.E. 572, 575 (1900). That court asserted that a law disarming "tramps" was consistent with the right to bear arms because the right did not entitle "vicious persons to carry weapons with which to terrorize others." *Id.*

But the "tramp" in that case was charged with threatening to injure another person, and the right to bear arms "was not involved in this prosecution ...." *Hogan*, 63 Ohio St. at 209, 218.

This Court has recognized the use of vagrancy laws in the Black Codes to subjugate the freedmen. "Among these laws' provisions were draconian fines for violating broad proscriptions on 'vagrancy' and other dubious offenses.... When newly freed slaves were unable to pay imposed fines, States often demanded involuntary labor instead." *Timbs v. Indiana*, 139 S. Ct. 682,688-89 (2019), citing, e.g., Mississippi Vagrant Law, Laws of Miss. § 2 (1865), in 1 W. Fleming, *Documentary History of Reconstruction* 283-285 (1950).

These were part and parcel of the same Black Codes that disarmed the freedmen. For instance, another Mississippi law provided that "no freedman, free negro or mulatto, ... not licensed so to do by the board of police of his or her county, shall keep or carry fire-arms of any kind ....." *McDonald v. City of Chicago*, 561 U.S. 742, 771 (2010), quoting Certain Offenses of Freedmen, 1865 Miss. Laws p. 165, § 1, in 1 *Documentary History of Reconstruction* 289.

The Civil Rights Act of 1866 "sought to protect the right of all citizens to keep and bear arms." *McDonald*, 561 U.S. at 774. See also Stephen P. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms* 5-32 (1998). In debate on the ***16** Act, Rep. Burton Cook of Illinois observed: "Vagrant laws have been passed; laws which, under the pretense of selling these men as vagrants, are calculated and intended to reduce them to slavery again; and laws which provide for selling these men into slavery in punishment of crimes of the slightest magnitude ...." Cong. Globe, 39th Cong., 1st Sess., 1123 (1866), quoted in *City of Memphis v. Greene*, 451 U.S. 100, 134 n.6 (1981) (White, J., concurring).

Justice Joseph Bradley wrote that the Civil Rights Act was "in direct conflict with those State laws which forbade a free colored person to remove to or pass through the State, from having firearms,... and laws which subjected them to cruel and ignominious punishments not imposed upon white persons, such as to be sold as vagrants ...." *Blyew v. United States*, 80 U.S. 581, 556-57 (1871) (Bradley, J., dissenting). The Act was passed in part to counter state laws that, "under the guise of Apprentice, Vagrant, and Contract regulations, sought to keep the colored race in a condition, practically, of servitude." *Civil Rights Cases*, 109 U.S. 3, 43 (1883) (Harlan, J., dissenting).

Concern with vagrancy laws lingered well into the next century. In *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972), this Court held a vagrancy law to be void for vagueness. "The poor among us, the minorities, the average householder are ... not alerted to the regulatory schemes of vagrancy laws," and the ordinance at issue "makes criminal activities which by modern standards are normally innocent." *Id.* at 162-63. Indeed, "A vagrancy prosecution may be merely the cloak for a conviction which could not be obtained ***17** on the real but undisclosed grounds for the arrest." *Id.* at 169.

In sum, the laws on "Greasers," "vagrants," and "tramps" provide no appropriate historical analogues that justify § 922(g)(8).

III. Laws and Practices Regarding Political Repression, Riot, War, and Insurrection are Not Appropriate Analogues

The references to English and American history by the United States provide no support for § 922(g)(8). Br. 13-18. Policies regarding seizure of arms by governments in conflict with political opponents, other governments, or insurrectionists bear no resemblance to whether it is constitutional to prohibit possession of arms in the course of adjudication of conflicts between private individuals.

The "irresponsible" subjects disarmed by the Stuart kings to whom the United States refers (Br. 14) were their Protestant "political enemies." *District of Columbia v. Heller*, 554 U.S. 570, 594 (2008). The English Bill of Rights of 1689 recognized that only "Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law." Those disarmed thereafter under the Militia Act were considered "dangerous" (Br. 14-15) because they were "Papists," i.e., Catholics. *Heller*, 554 U.S. at 582-83.

The United States refers to the 1780 London riots in which officials confiscated the rioters' arms. Br. 15-16. The Duke of Richmond raised the issue in the House of Lords of whether citizens who defended themselves were disarmed, but Lord Amherst ***18** represented that arms were seized only from "the mob" and denied "that the arms could be taken away from the associated citizens, who had very properly armed themselves for the defence of their lives and property." 49 *London Magazine or Gentleman's Monthly Intelligencer* 467-68 (1780), quoted in Halbrook, *The Right to Bear Arms* at 78. As the context makes clear, the only arms legitimately confiscated were those actually being used by the rioters.

As the United States notes, during the Revolution loyalists were disarmed. Br. 22. Indeed, the patriots were particularly concerned with confiscating the firearms and estates of Tories as well as suppressing Tory publications and associations. They did so through passage of bills of attainder - legislative trials without any ability of the condemned persons to rebut the charges. See Stephen P. Halbrook, *The Founders' Second Amendment* 116-21 (2008). The state of war justified actions that would never be condoned or considered constitutional in peacetime.

What the patriots did at the time was equivalent to what was formalized in the war power in U.S. Const., Art. I, § 8, and in the Alien Enemy Act of 1798, which provided for the apprehension and summary removal of alien enemies from the United States. See *Ludecke v. Watkins*, 335 U.S. 160, 163 (1948). If our enemies were entitled to the protections of the "civil-rights Amendments," then "irreconcilable enemy elements, guerrilla fighters, and 'were-wolves' could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, ***19** security against 'unreasonable' searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments." *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950).

The United States quotes the Dissent of Minority from Pennsylvania's ratifying convention proposing a bill of rights that forbade "disarming the people, or any of them, unless for crimes committed, or real danger of public injury from individuals." Br. 17, quoting 2 *Documentary History of the Ratification of the Constitution* 598 (1976). The "crimes committed" reference is not relevant here, but the United States quotes a commentator as supposedly agreeing that "Congress should have the power to disarm individuals who posed a 'real danger of public injury.'" *Id.*, citing Nicholas Collin, *Remarks on the Amendments to the Federal Constitution ... by a Foreign Spectator*, No. 11 (Nov. 28, 1788). But Collin was referring to "the occasional suspension" of the privilege of habeas corpus, in which "dangerous persons are secured. Insurrections against the federal government are undoubtedly real dangers of public injury, not only from individuals, but great bodies; consequently the laws of the union should be competent for the disarming of both." *Federal Gazette*, Nov. 28, 1788, quoted in Halbrook, *The Founders' Second Amendment*, at 215.

These concerns were reflected in the New Hampshire ratifying convention's demand for a guarantee that "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion." 18 *Documentary History of the Ratification of the Constitution* 188 (1995).

***20** Collin and the New Hampshire delegates were not concerned with a federal police power of the type here, which was unheard of until the late 20th century. They had in mind insurrections like Shays' Rebellion of 1787. As the United States notes, after putting down the rebellion, Massachusetts required the rebels, as a condition of being pardoned, to surrender their arms, which would be returned to them after three years if they kept the peace. Br. 22-23 & n. 12, citing Act of Feb. 16, 1787, §§ 1-3, 1 Private and Special Statutes of the Commonwealth of Massachusetts 145-147 (1805). The procedure was that the offenders would "deliver up their arms and take and subscribe the oath," the justice of the peace who took the arms and gave the oath would make a list of to whom the arms belonged, and the arms would be returned in three years. *Id.*, § 3, at 146-47. There was no prohibition on obtaining other arms during that period.

The following year, each of the above citizens who took the oath (except the ringleaders) were pardoned, and those who had "delivered up their arms" or "had their arms taken from them" were "intitled to receive the said arms" from the officer who had them. 1786-1787 Mass. Acts & Laws ch. ch. 21, at 678-79.

In sum, governments confiscate arms from entities to which they are in conflict, including political opponents, enemies in wartime, and insurrectionists. Such practices in English and American history provide no historical analogues to a prohibition on arms stemming from an adjudication of conflicts between private individuals.

*21 IV. Laws Providing for Forfeiture of Arms Used in Offenses Did not Affect Possession of Other Arms

There is a long tradition of providing for the forfeiture of arms that are used in criminal offenses. But such laws did not require the forfeiture of other arms the person may have possessed or may obtain in the future. They are thus not historical analogues of § 922(g)(8), which prohibits possession of any and all arms.

The Statute of Northampton prohibited going or riding armed "in a terrifying manner," and "made violations punishable by forfeiture of the weapons." Br. 15, citing 2 Edw. 3, c. 3 (1328) (Eng.). The forfeiture of weapons used in an offense did not apply to other arms that the offender might possess or obtain.

As the United States concedes, the colonial and early state laws that "punished irresponsible use of arms with forfeiture of the arms ... involved forfeiture of arms involved in an offense, rather than bans on possessing arms ....." Br. 23-24. For instance, Virginia's 1786 law provided that no man shall "go nor ride armed by night nor by day, in fair or markets, or in other places, in terror of the Country, upon pain of being arrested and committed to prison" for no more than one month, and "to forfeit his armour to the commonwealth ....." Act Forbidding & Punishing Affrays, 1786 Va. Laws 33, ch. 21.

The surety laws cited by the United States did not provide for forfeiture of any arms. Br. 24. The first such law provided that if a person went armed *22 "without reasonable cause to fear" assault or other injury, he may "be required to find sureties for keeping the peace" on complaint of a person with cause to fear injury or breach of the peace. Mass. Rev. Stat. ch. 134, § 16 (1836). It did not require forfeiture of the arm that was carried, nor did it prohibit possession of other arms.

Nor are the references by the United States to events of the mid-19th century relevant here. No one would disagree with the disarming of "armed bandits" and "armed bands," or that peaceable citizens should not be disarmed. Br. 19-20. Nor would anyone dispute the Freedmen's Bureau circular that "[a]ll men, without distinction of color, have the right to keep arms," but that "[a]ny person, white or black, may be disarmed if convicted of making an improper and dangerous use of arms." Br. 21, quoting H.R. Exec. Doc. No. 70, 39th Cong., 1st Sess. 65 (1866). That referred to the confiscation of the specific arm used in the crime for which the person was convicted.

V. Dissimilar Laws on the Sale of Arms to, and the Carrying of Arms by, Minors

The United States cites a number of dissimilar laws, mostly from the latter part of the nineteenth century, that restricted sale of firearms to, or possession by, minors under certain ages. Br. 25 n.16. However, "The belated innovations of the mid- to late-19th-century courts come too late to provide insight into the meaning of [the Constitution in 1787]," *23 *Bruen*, 142 S. Ct. at 2137 (brackets in original) (citation omitted). See also *id.* at 2154.[7]

The United States does not quote the text of any of these laws. They are irrelevant as historical analogues to § 922(g)(8). Indeed, the laws are so dissimilar that it is difficult to find a common thread between them, other than that they restricted sale of certain arms to certain minors.

Only two of the cited laws were enacted before the post-bellum period. Alabama banned the sale of an "air gun or pistol" to "any male minor." Act of Feb. 2, 1856, No. 26, § 1, 1856 Ala. Acts 17. Tennessee prohibited the sale of a pistol to "any minor," but it did not apply to sale of "a gun for hunting." Act of Feb. 26, 1856, ch. 81, § 2, 1856 Tenn. Acts 92.

Some of the cited laws did not apply to guns used for hunting or to sales with parental permission. Florida prohibited sale "to any minor under sixteen years of age any pistol, dirk or other arm or weapon, other than an ordinary pocket-knife, or a gun or rifle used in hunting, without the permission of the parent of such minor ...." Act of Feb. 4, 1881, ch. 3285, No. 67, § 1, 1881 Fla. Laws 87.

Illinois prohibited sale of a pistol "capable of being secreted upon the person" to a minor, except that it did not apply to "the father, guardian or employer of the minor." Act of Apr. 16, 1881, § 2, 1881 Ill. Laws 73. Rhode Island banned the sale of a gun or pistol to "any child under the age of fifteen years, without the ***24** written consent of parent or guardian of such child." Act of Apr. 13, 1883, ch. 374, § 1, 1883 R.I. Acts & Resolves 157. And see 1 Mo. Rev. Stat. ch. 24, Art. II, § 1274, at 224 (1879) (sale of firearm "without the consent of the parent or guardian of such minor"); Act of 1897, ch. 155, § 1, 1897 Tex. Gen. Laws 221 (sale of pistol "without the written consent of the parent or guardian of such minor").

Georgia prohibited sale of a pistol to a minor, but it did not apply to "furnishing of such weapons under circumstances justifying their use in defending life, limb or property." Act of Feb. 17, 1876, No. 128, § 1, 1876 Ga. Laws 112.

The ages of the minors to whom the laws applied varied greatly. See Act of Nov. 16, 1896, No. 111, § 1, 1896 Vt. Acts & Resolves 83 ("a child under the age of twelve years"); Act of June 2, 1883, No. 138, § 1, 1883 Mich. Pub. Acts 144 ("any child under the age of thirteen years"); Act of Mar. 25, 1880, § 1, 1880 Ohio Laws 79-80 ("to any minor under the age of fourteen years"); Act of Feb. 10, 1882, ch. 4, §§ 1-2, 1882 N.J. Acts 13-14 ("any person under the age of fifteen years"); Act of June 10, 1881, § 1, 1881 Pa. Laws 111-112 ("to any person under sixteen years of age").

One ban on sale of a pistol or other firearm to a person under 18 was limited to the cities of the state. Act of May 10, 1883, § 1, ch. 375, 1883 N.Y. Laws 556.

Some states banned the sale of certain weapons to minors under twenty-one. E.g., Act of May 3, 1882, ch. 424, § 2, 1882 Md. Laws 656 (banning sale of "any firearm whatsoever or other deadly weapons, except shot guns, fowling pieces and rifles").

***25** Finally, a few states regulated the carrying of certain arms by minors. New York prohibited a person under 18 to carry a firearm "in any public street, highway or place in any of the cities of this state," but it did not apply to "the carrying of a gun or rifle through a street or highway of any city, with the intent to use the same outside of said city; nor to any person under such age carrying any pistol or other fire-arms under a license given by the mayor of said cities ...." Act of May 10, 1883, § 1, ch. 375, 1883 N.Y. Laws 556. [8]

The above laws regulated the carrying of arms by minors, not the mere possession thereof. The only cited law that prohibited mere possession applied to a child aged under twelve. Act of Nov. 16, 1896, No. 111, § 1, 1896 Vt. Acts & Resolves 83 ("No child under the age of twelve years shall have in his control or possession a firearm").

It is difficult to see the relevance of these mostly late 19th century laws cited by the United States to the issue here. To the extent they are valid analogues at all, they at most would support regulation of the sale and carrying of firearms by minor children who are under the control of parents or guardians. The above cited laws provide no valid historical analogues to § 922(g)(8).

***26** **VI. Sales to Persons of Unsound Mind and to Intoxicated Persons**

The United States string cites to a handful of laws from the second half of the 19th century restricting the sale of arms to persons of unsound mind and intoxicated persons. While those laws appear to be consistent with the Second Amendment, they are not appropriate historical analogues to § 922(g)(8).

Three laws are cited that "banned the sale of guns to persons of unsound mind." Br. 24-25 & n.17. One of them applied to the sale of a weapon "to any inmate of a state hospital." Act of Feb. 17, 1899, ch. 1, § 52, 1899 N.C. Pub. Laws 20-21. See also Act of Feb. 4, 1881, ch. 3285, No. 67, § 1, 1881 Fla. Laws 87 (sale to person "of unsound mind any dangerous weapon, other than an ordinary pocket-knife"); Act of Mar. 5, 1883, ch. 105, § 1, 1883 Kan. Sess. Laws 159 (sale of pistol "to any person of notoriously unsound mind").

There is a long history in England and America of regulation and confinement of persons of unsound mind. Here, the United States failed to provide information on any of this history, other than these three late 19th century laws, which are not appropriate historical analogues for § 922(g)(8).

The United States also cites laws that "forbade intoxicated persons from buying or carrying guns." Br. 25-26 & n.19. See Act of Feb. 23, 1867, ch. 12, § 1, 1867 Kan. Sess. Laws 25 (unlawful for "any person under the influence of intoxicating drink" to carry a pistol or edged weapon on his person); Act of Feb. 28, 1878, ch. 46, § 2, 1878 Miss. Laws 175 ("sale to person known to be ... intoxicated a bowie knife, pistol, other ***27** deadly weapon of like kind"); Act of Apr. 3, 1883, ch. 329, § 3, 1883 Wis. Sess. Laws, Vol. 1, at 290 ("unlawful for any person in a state of intoxication, to go armed with any pistol or revolver."). See *State v. Shelby*, 90 Mo. 302, 305, 2 S.W. 468, 469 (1886) ("The mischief to be apprehended from an intoxicated person going abroad with fire-arms upon his person").

These laws are not historical analogues that justify § 922(g)(8). They applied only at the time when the person was intoxicated and in public. While the states may certainly restrict the unsafe use of firearms by intoxicated persons in public, the above laws simply are not relevant here.

VII. Section 922(g)(8) Is Not Warranted By "Novel Modern Conditions"

The issues here do not involve "unprecedented societal concerns or dramatic technological *changes,"Bruen*, 142 S. Ct. at 2132, that would absolve the government from presenting appropriate historical analogues to justify § 922(g)(8). First, the Founders were well aware of the existence of spousal abuse, which was suppressed by surety laws and criminal laws, under both of which violators could be fined and jailed. Second, while firearms technology improved over time, persons motivated to commit acts of violence resorted to whatever weapons were at hand.

The United States argues that "[t]he absence of historical laws specifically targeting domestic abusers is especially unilluminating" based on "legal, social, and technological factors that have nothing to do with the Second Amendment." Br. 40. Protective orders ***28** supposedly did not exist, and "interspousal tort immunity precluded courts from hearing abused wives' civil suits against their husbands." *Id.*

To the contrary, English law provided that "one threatened to be beaten may demand the Surety of the Peace," and "a Wife may demand it against her Husband threatening to beat her outrageously ...." 1 Hawkins, *Pleas of the Crown* 127 (4th ed. 1762). See 1 Blackstone, *Commentaries*, *433 (1765) ("a wife may now have security of the peace against her husband").

A recognizance to keep the peace or be on good behavior could be required by a justice of the peace, including by request of "any subject." 4 Blackstone *250. If the justice did not act, a writ called a "supplicavit" could be issued by a court. *Id.* "Wives may demand it against their husbands ...." *Id.* at *251.

A person who would "threaten to kill or beat another" or "go about with unusual weapons or attendance, to the terror of the people," was required to find sureties to keep the peace. "Such recognizance for keeping the peace, when given, may be forfeited by any actual violence, or even an assault or menace, to the person of him who demanded it," resulting in commitment to jail. *Id.* at *252-53.

These legal norms had teeth. One English court denied a motion by a husband to discharge an order for a supplicavit on the part of the wife with the comment, "I am to take care of the person who swears her life is in danger." *King v. King*, 28 E.R. 369, 2 Vesey Senior 578 (Ct. Chy. 1754). In another case, a husband "was under confinement on a supplicavit, at the complaint of his wife, until he found securities for his behaviour"; ***29** he could not find any and was held in prison for three years until released. *Baynum v. Baynum*, 27 E.R. 36 (Ct. Chy. 1747).

While the procedures may have differed, American laws of general applicability protected everyone subjected to abuse. That included not only criminal laws governing assault and battery, but also surety laws that provided for what were essentially restraining orders. For instance, Massachusetts law provided that any person who would "make an affray, or threaten to kill or beat another, or to commit any violence or outrage against his person or property," could be ordered to keep the peace or be of good behavior. No further process or other proof was required. 1836 Mass. Laws 748, § 15. This provision included behavior such as going armed in a manner causing a person to have "reasonable cause to fear an injury, or breach of the peace." *Id.* § 16.

The United States cites *Thompson v. Thompson*, 218 U.S. 611, 618 (1910), which held that a District of Columbia statute did not authorize a wife to bring an action for damages for assault and battery by the husband. But, "She may resort to the criminal courts, which, it is to be presumed, will inflict punishment commensurate with the offense committed." *Id.* at 619.

Dissenting, Justice Harlan would have held that the wife did have an action in tort under the law. *Id.* at 621 (Harlan, J., dissenting). State courts holding the same approved of Justice Harlan's dissent. E.g., *Fiedeer v. Fiedeer*, 42 Okla. 124, 140 P. 1022, 1024 (1914).

In short, the Founders were well familiar with the problem of interspousal violence, which was ***30** deterred through the surety laws, which played a similar function to today's restraining orders, and through enforcement of criminal laws of general applicability. Section 922(g)(8) is thus not supported by "unprecedented societal concerns." *Bruen*, 142 S. Ct. at 2132.

The United States next argues that "because of technological differences, the combination of firearms and domestic strife did not pose the same threat in the past that it poses today." Most guns at the Founding were single shots, while today firearms may be fired multiple times without reloading. Br. 41, citing Randolph Roth, "Why Guns Are and Are Not the Problem," in Jennifer Tucker et al. eds., *A Right to Bear Arms?: The Contested Role of History in Contemporary Debates on the Second Amendment* 117 (2019). But Roth wrote: "Family and household homicides ... were committed almost exclusively with weapons that were close at hand: whips, sticks, hoes, shovels, axes, knives, feet, or fists." *Id.* Lack of one type of weapon is irrelevant when substitute weapons are available.

The United States adds that the development of revolvers and other multi-shot firearms led to their increased use in homicides. Br. 41, citing Roth at 123-27. But Roth wrote that "the United States would have become a homicidal society in the mid-nineteenth century even if gun ownership had not been widespread and modern firearms had not been invented." Roth at 127. The difference was that previously homicides "overwhelmingly stemmed from ***31** kicking, clubbing, or stabbing deaths rather than shooting deaths." *Id.* [9]

No matter what the instrument, the Founders had the same rules for all types of physical aggression. Assault and homicide had the same definitions regardless of what weapon or body part was used and regardless of the relation between the perpetrator and the victim. It was not as if the Founders were unfamiliar with violence, whether domestic or not.

In short, the criminal misuse of firearms has not created "novel modern conditions," *Bruen*, 142 S. Ct. at 2134 (citation omitted), such as would justify § 922(g)(8).

CONCLUSION

This Court should affirm the judgment of the court below and hold that 18 U.S.C. § 922(g)(8) violates the Second Amendment.

***32** Respectfully submitted,

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Footnotes

1 No counsel for a party authored this brief in whole or in part nor did such counsel or any party make a monetary contribution to fund the preparation or submission of this brief. No person other than this amicus curiae, its members, or its counsel made such a monetary contribution.

2 In the years 2013 to 2017, there were 26,717 convictions under § 922(g) based on felon status, and only 121 for restraining order status. "Federal Weapons Prosecutions Rise for Third Consecutive Year," *Trac Reports*, Nov. 29, 2017. https://trac.syr.edu/tracreports/crim/492/.

3 One of the professors on behalf of which this brief was filed is Saul Cornell, author of "Cherry-picked History and Ideology-driven Outcomes: *Bruen's* Originalist Distortions," SCOTUS Blog, June 27, 2022.

4 https://www.stanfordlawreview.org/online/on-sordid-sources-in-second-amendment-litigation/.

5 The term "Digger" "served to encapsulate Indians as being treacherous, bloodthirsty, dirty, squalid, lazy, comic, and/or pathetic ...." Allan Lonnberg, "The Digger Indian Stereotype in California," 3 *Jour. of California & Great Basin Anthropology*, No. 2, at 215, 216 (1981).

6 *Id.* § 4; Act of Mar. 27, 1879, ch. 59, § 4, 1879 Conn. Pub. Acts 394; Act of May 5, 1880, ch. 176, § 4, 1880 N.Y. Laws, Vol. 2, at 297; Act of Mar. 12, 1879, ch. 198, § 2, 1879 N.C. Sess. Laws 355.

7 Mark Smith, "Attention Originalists: The Second Amendment was Adopted in 1791, not 1868," 31 *Harvard J. of Law & Pub. Policy* 1 (Fall 2022).

8 See also Act of Mar. 29, 1882, ch. 135, § 1, 1882 W. Va. Acts 421 (minor may not "carry about his person any revolver or other pistol"); Act of Apr. 3, 1883, ch. 329, § 2, 1883 Wis. Sess. Laws, Vol. 1, at 290 (minor may not "go armed with any pistol or revolver"); Act of Mar. 2, 1885, ch. 51, § 1, 1885 Nev. Stat. 51 (person under 21 may not "wear or carry any ... pistol ... concealed upon his person").

9 Elsewhere, Roth wrote: "Technology had little to do with the increase in spousal murders, however.... If the perpetrator was an abusive husband, he clubbed, beat, or stabbed his victim." Randolph Roth, *American Homicide* 252 (2009).

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